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SUPREME COURT, U. S.

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No. 113

In the Supreme Court of the United States

OCTOBER TERM, 1961

BUFORD MALONE, JR., PETITIONER

vs.

JAMES A. BOWDOIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether an action may be maintained by one private citizen to eject another private citizen from lands in which the defendant sued is claiming to be a Federal Officer and is holding possession of the land as a Federal Officer.

STATEMENT

This is a suit by private parties to eject a citizen of the United States who comes into court and says that he is holding the land by virtue of being a Forester for the United States and is claiming title to the land on behalf of the United States. He contends that he is not

holding individually and his only right of possession is as a Forester employed by the Forest Service of the United States.

The Motion for More Definite Statement, (R 10-13), was not heard before the District Court, but it was expressly agreed that this question would remain open pending a hearing on a jurisdictional question.

The only thing involved in this case is a question of Jurisdiction.

Petitioner in his statement (Br. 6, 2nd paragraph) is attempting to bring into the record the merits of the case as to who has the title to the property. That is a question to be decided upon a trial. In the same paragraph he cites a portion of the record, (R. 49-50-51), which is merely a letter from the writer of this brief to the Attorney General and United States Attorney attempting to settle the case by laying the facts before these gentlemen so that we might decide who has the title to said property without the necessity of a trial.

The statement of petitioner, insofar as it cites the record, is substantially correct, but the conclusion drawn therefrom is not admitted to be correct.

SUMMARY OF ARGUMENT

I.

This is a suit by the respondents against petitioner to oust the petitioner from lands in Jasper County, Georgia. The suit was brought in the State Court of Georgia and removed to Federal District Court. The United States has been dismissed as a party and the only issue is whether a suit can be maintained against petitioner to oust him from possession of this land.

The question of whether the United States is contending that it owns the land is not involved in this suit.

The chief reliance of the respondents is as stated by petitioner in the case of U. S. vs. Lee, 106 U. S. 196, and Land vs. Dollar, 330 U. S., 731.

The Lee case is identical with this case, and the questions of law presented in the Dollar case are controlling. The only relief asked for in this case is the ejectment of petitioner from the land, and the only relief that the Court could give would be a writ of possession ousting petitioner from the land.

II.

(a.) It would be most unjust for an individual to oust another citizen of the United States from land, and then in a suit for possession of the land brought by the alleged owner, for the defendant in the case to come into court and say, "You cannot oust me for I am holding government land."

This is not in any way interference with the efficient administration of government of the public domain and it does not ask for specific relief as in Larson vs. Domestic and Foreign Corp., 337 U. S., 682.

(b.) The Tucker Act will not give the respondents complete and adequate relief as the government could possibly come in and say they are not claiming the land involved in this case.

ARGUMENT

So far as the rules of the Court permit, I adopt the clear, concise and excellently delivered opinion of Judge Cameron of the Fifth Circuit Court of Appeals, (R 21-39). I will not burden this Court by rewriting

this opinion in a different narrative form, but agree that everything that he says in the opinion is correct.

Respondents say they have the right to proceed against the defendant, Buford Malone, Jr., to take possession of this land in an ejectment suit, if the case is made out, under the authority of:

U. S. vs. George W. P. C. Lee

and under the same case, cited together of Frederick Kaufman, et al. vs. George W. P. C. Lee, 106 U. S. beginning at page 196

This case was to recover possession of a parcel of land of about 1100 acres known as the Arlington Estate. It was an action of ejectment in the form prescribed by the statutes of Virginia, under which the pleadings are in the name of the real parties, plaintiff and defendant.

Of course, in Georgia, the fictitious form of ejectment is usually used.

This case was one in which the plaintiff had received title from his grandfather, George Washington Parke Custis, who devised the Arlington Estate to his daughter, the wife of Gen. Robert E. Lee, for life, and after her death to the plaintiff.

The case at bar is one in which the plaintiffs contend that the land described in the petition was willed to their mother, Martha Toland, later Sanders, then Bowdoin. This land was willed to her, for her lifetime, and at her death to her children.

The daughter of Michael Toland died in 1928, and we contend at that time title descended into plaintiffs, or where a deceased child of Mrs. Bowdoin had died prior to suit, into her grandchildren, who are some of the plaintiffs herein.

The Lee case is ample authority that jurisdiction of this case lies to recover possession of the property from Buford Malone, Jr.

Sawyer vs. Osterhaus, 195 Fed., 655 and 212, Fed. 765.

In this case the plaintiff brought his action against an Admiral of the Navy for possession of lands. The Court held that the suit could be maintained. The case was lost for the plaintiff on the merits, because he was unable to prove title, but the holding was that such an action would lie and bears out our contention that the action will lie against Mr. Buford Malone, Jr.

Emory S. Land (Chairman, U. S. Maritime Commission) Howard L. Vickery (Vice-chairman, U. S. Maritime Commission) et al. vs/ R. Stanley Dollar, Dollar Steamship Line, J. Harold Dollar Estates Company et al., 330 U. S., 731-743.

This was an action by Dollar to recover stock held by Land et al. which the petition alleges was pledged to secure a loan which had been paid.

The Court, on page 737, headnote 2, held as follows:

"Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of U. S. vs. Lee, 106 U. S. 196, has been repeatedly approved."

On page 738 in headnote 5, the Court held as follows:

"And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory

action to reclaim that which is wrongfully withheld."

"It is in the later category that the pleadings have case this case. That is to say, if the allegations of the petition are true, the shares of stock never were property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority as public officers. If ownership of the shares is in the United States suit to recover them would of course be a suit against the United States. But if it is decided on the merits either that the contract was illegal or that respondents or pledgors they are entitled to possession of the shares as against petitioners, though, as we have said, the judgment would not be res judicata sa against the United States, (See U. S. vs. Lee, 106 U. S., page 222)".

We contend that the Respondents here own the title to the land described in the complaint, and that whether acting as an individual or acting as an officer of the United States, Mr. Malone, the Petitioner, is acting beyond his authority in holding possession of land of the Respondents and that we are entitled to proceed with this ejectment suit against him to test his possession upon the merits of the case.

Larson vs. Domestic and Foreign Corp., 337 U. S. 682, is foreign to the issues in this case.

The Larson case was a case in which the Domestic Corp. contended it had bought coal belonging to the United States from a prior administrator and asked equitable relief decreeing title into the petitioner in the case, and enjoining the Administrator from selling the coal belonging to the United States to another purchaser.

In that case the relief sought was to take over the coal belonging to the United States requiring an equitable decree for specific performance of a contract which would require the Administrator to sell the coal belonging to the Government. In most jurisdictions, and especially in Georgia, specific performance is an equitable remedy and cannot be used in sales or contracts for sales of personal property, but is limited to require specific performance of contracts for the sale of realty. In sales of personalty, one is relegated to a suit for damages.

Petitioner in his brief contends that ejectment in Georgia is an action to try title to land. This is incorrect. It is a mixed action, partly for tort, and partly for trial of title. It can be either one. In this case we are contending that petitioner tortiously went on our land and is attempting to hold same without right or title.

The standing of petitioner in this case would be no better as to jurisdiction than if an enforcement officer of the Alcohol Tax Unit of the Treasury Department were trying to catch a liquor runner in an automobile and the Agent's car gave out of gas, whereupon he commandeered an automobile of a motorist on the highway and then in a trover suit filed by the motorist to recover the automobile from the Treasury Agent, the Treasury Agent came into court and said, "I am not claiming this automobile for myself. It belongs to the United States government and you cannot claim title."

In Footnote 10 at the bottom of page 35 of petitioner's brief he stated that: "The United States owns more than 407,000,000 acres of land as part of the public domain . . ."

If this case is reversed and a suit could not be brought in this type case, then the United States could own all of the land located within its boundaries by having Agents or Forestry Officers or Bureau of Roads Officers to obtain possession of lands of private citizens and then, when the citizen tries to get it back, say that the official is not claiming except under some duty of his position which he believes entitles him to hold the land. For instance, if a janitor at a post office caught the owners of a home next door away on vacation, and moved into their home he could say that he is not living in there as an individual, but that his duties as janitor of the post office next door require that he live adjacent to the post office and that he is only holding the property under color of title for the benefit and convenience of the United States.

In Footnote 11, page 39, of the Brief for Petitioner the following is stated: "The government is also usually willing to bring its own actions to quiet titles to lands in its possession where substantial, reasonable, and active claims may be asserted by private citizens."

At the pre-trial conference held before Judge Bootle when he rendered his decision, the respondents through this attorney, offered to cut a hollow tree on the land and let the government bring an action against respondents for trespass, or any other action they desired, and this matter could be settled. The Assistant Attorney General appearing for Mr. Malone has declined to bring an action that the Solicitor General and attorneys for the Department of Justice now seem so willing to have this Court believe that it would do. If such an action were brought then this case would probably become moot.

The appendix contained in petitioner's brief beginning on page 41 has no probative value in any Court. This is only a directive by Congress to the Attorney General to examine titles to land purchased by the United States. The fact that the Attorney General examines a title does not mean that he is infallible and cannot make an error or omission in the examination. His certificate of title would not be evidence. He would have to show good title.

To reverse this case, it seems to me that it will be necessary for the Court to expressly overrule the Landmark Cases of United States vs. Lee, 106 U. S. 196, and Land vs. Dollar, 330 U. S. 731.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the Court of Appeals is correct, and should be affirmed.

Respectfully submitted.

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